action to eject the companies from the streets. The alternative by itself, as was seen above, would not have offended against the constitution. But the order to reduce the rates was not a mere statement of the city's claim to have such a right with a direction to litigate it. It was an attempt to exercise the coercive power to reduce rates. The alternative was an alternative only in words. As was pointed out in *Detroit* v. *Detroit Citizens Ry.*,[21] the law would have been practically self-enforcing, since the public would have refused to pay more than the new rate until the companies had established their rights at law. In the case above the city only claims the right to order a removal, though actually ordering it in form; in the principal cases the city orders a self-enforcing reduction, though in form only claiming the right. Clearly this is a law impairing the obligations of the franchises.

THE NATURE OF RIGHTS INVOLVED IN AN OIL AND GAS LEASE.—When the owner of a tract of land grants to another the exclusive right to explore and drill for oil and gas on his land, and, if the same be found in paying quantities, to remove it, in consideration of the payment of a royalty, which is generally a certain proportion of the mineral itself, there exists what is commonly known as an oil and gas lease. The determination of the nature of this so-called lease, and of the rights of the parties thereto, has occasioned much diversity and confusion of language on the part of the courts in the states where oil lands are to be found. It is proposed to discuss here the situation which exists when the right of the lessee, which is contingent on the discovery of the mineral, vests, by oil and gas being produced in paying quantities.

First of all it is important to notice what the right of the owner of the land is in the oil and gas beneath his land before he makes the lease. Although for many purposes his right is like a property right, he is not, strictly speaking, the owner of the oil and gas beneath the land, but merely has an exclusive right to drill for it and to reduce it to possession, at which time he gets title to it. The reason for the distinction between a landowner's right to oil and gas and his ownership in solid minerals like coal lies in the "vagrant and fugitive" nature of oil and gas which causes it to flow from one tract of land to another, and makes it possible for the owner of one tract to exhaust the supply from beneath the surrounding land. The fact that the landowner has no ownership, or as many courts put it, has but a qualified ownership in oil and gas not reduced to possession, has been most clearly recognized in cases involving the constitutionality of statutes prohibiting the wasting of one of these fluid minerals in the process of extracting another from the ground. The United States Supreme Court has held that such statutes are not a taking of the surface owner's property without due process of law, because he has no property in the mineral until it is reduced to possession.[1]

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[21] 184 U. S. 368, 379.

[1] Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61. For a discussion of these cases and of the rights of a landowner in underlying oil and gas, see a note in 25 HARV. L. REV. 76.

This analysis of the right of the landowner simplifies the problem of what is the right of the lessee under these so-called leases. The landowner cannot grant any more than he has, and all the lessee gets is a right to drill for and reduce to possession the oil and gas which is from time to time beneath the land in question. Such a right is an incorporeal hereditament, or, more specifically, a *profit à prendre*,[2] exactly analogous to a profit to hunt and fish on the land of another.[3] If an oil lease differs from most profits in that the right to take oil given to the holder of the servitude is exclusive, that is only because of the covenant to that effect in the lease and not because of any fundamental difference between an oil lease and other profits.[4]

The courts, however, in determining the nature of an oil lease, have frequently not started with the premise that the landowner cannot grant more than a right to take oil, but have looked on him as the owner of the oil beneath the surface of his land, just as he is the owner of coal beneath his land,[5] and have undertaken to determine the extent of the right granted from the words of the lease. In this manner three general conclusions have been reached: (1) That the lease is a sale of the oil and gas in place, and the royalty is the purchase price;[6] (2) that the so-called lease is in fact a lease, creating an estate in the lessee, the royalty being rent;[7] and (3) that the lease gives merely a right to go on the land, to drill for and to remove the oil, that is, gives a *profit à prendre* to the lessee.[8] The first of these views, set forth in some of the Pennsylvania

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[2] See 29 HARV. L. REV. 788.

[3] See Wickham *v.* Hawker, 7 M. & W. 63, 79; CO. LITT. 122 *a*; 2 BL. COMM. 34*.

[4] Funk *v.* Haldeman, 53 Pa. 229, 242. In this early case the court makes an accurate analysis of the nature of an oil lease. If subsequent cases in Pennsylvania had followed the language of this case, much of the confusion now existing in that state on this topic would have been avoided. But see Hicks *v.* American Natural Gas Co., 207 Pa. 570, 577, 57 Atl. 55.

[5] Appeal of Stoughton, 88 Pa. 198, 201.

[6] Wettengel *v.* Gormley, 160 Pa. 559, 566, 28 Atl. 934; Blakely *v.* Marshall, 174 Pa. 425, 429, 34 Atl. 564. In Appeal of Stoughton, 88 Pa. 198, 202, the court said, referring to the lease: "Its terms, *inter alia*, were 'the party of the second part to have the sole and exclusive right to bore and dig for oil in said lot, and gather and collect the same therefrom for the term of twenty-one years from the date hereof.' This certainly amounts to an absolute sale of all the oil contained within the land described in the lease, subject only to the royalty therein provided for."

In *In re* Brunot's Estate, 29 Pitts. L. J. (N. S.) 105, the court held that such a lease was a sale, and that the royalties were personalty, going to the executor and not to the heir of the landowner.

[7] Headley *v.* Hoopengarner, 60 W. Va. 626, 55 S. E. 744, 747. In a reconsideration of Wettengel *v.* Gormley, *supra*, the court said: "The legal operation of this lease, as between the lessor and the lessee, 'their heirs, executors, or assigns,' was to sever the leasehold from the freehold estate. Thereafter the exclusive right of access to the oil-bearing stratum was in the lessee, whose duty it was to develop and operate the leasehold estate for oil and gas. The exclusive right to cultivate the surface, subject to the easement created upon and over it in aid of the operations of the lessee, was in the lessor. . . . The estates were separate, independent, and in independent hands. The one was personal, an estate for years. The other was real, a fee simple." 184 Pa. 354, 361, 39 Atl. 57.

[8] Mansfield Gas Co. *v.* Alexander, 97 Ark. 167, 133 S. W. 837; Osborn *v.* Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 S. W. 122; Brookshire Oil Co. *v.* Casmalia, etc. Co., 156 Cal. 211, 103 Pac. 927; Gillespie *v.* Fulton Oil & Gas Co., 239 Ill. 326; 88 N. E. 192; Beardsley *v.* Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859; Funk *v.* Haldeman, *supra;* Hicks *v.* Am. Natural Gas Co., *supra;* Venture Oil

decisions, is clearly erroneous. Not only is a sale of the oil in place impossible because the landowner has no property in the oil until it is reduced to possession, and because he cannot pass title to something which is not ascertained or determined,[9] but he does not purport to sell it. A sale or conveyance of solid minerals in place is quite possible, and is sometimes made,[10] but if the landowner grants a right to remove coal from his land, he does not thereby sell the coal, and no title passes to the grantee until the severance is made.[11] And so it is in the case of these oil leases. The landowner purports to grant only a right to take oil, and not title to the oil before it is taken. The second view, that the oil lease creates an estate in the lessee, is erroneous for the same reason. There is nothing in the language of the so-called lease to justify the conclusion that an estate has been created in the lessee, and it is generally held that ejectment is not the proper remedy of the lessee against someone interfering with his right in the land.[12] By the weight of authority an oil lease creates merely what it purports to create — a right to go on the land and take the oil. Although few cases call this a *profit à prendre* it is difficult to see how a better example of a profit could be found. It is unfortunate that the term "lease" was ever applied to such a transaction, for the situation is just analogous enough to a lease to make the comparison dangerous. The term is, however, universally applied, and must therefore be used, but always with a mental reservation.

The consideration given by the holder of this profit generally consists of two parts. First there is a so-called rent, a cash, or monthly, or annual payment for the privilege of exploring for oil, for delay in beginning operations, and for the "option" held by the lessee in the land until the discovery of oil, at which time his right vests. This rent is payable whether the lessee actually drills for oil or not.[13] Then there is the royalty, which is a certain percentage of the oil produced, or an annual payment for each well sunk. This royalty is frequently called rent, or is said to be like rent.[14] It is analogous to rent in many respects. It runs with the land when the lessor conveys the land to another, unless expressly reserved.[15] It can be assigned apart from the land.[16] Strictly speaking, however, a royalty is not rent, and to call it rent sometimes leads to erroneous conclusions. A rent is a return for the use of land.[17]

Co. *v.* Fretts, 152 Pa. 451, 456, 25 Atl. 732; Kelly *v.* Keys, 213 Pa. 295, 62 Atl. 911; State *v.* South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688.

[9] Blanchard *v.* Low, 164 Mass. 118, 121, 41 N. E. 118. See WILLISTON ON SALES, § 258.

[10] Caldwell *v.* Fulton, 31 Pa. 475.

[11] Baker *v.* Hart, 123 N. Y. 470, 25 N. E. 948.

[12] Funk *v.* Haldeman, *supra;* Kelly *v.* Keys, *supra.* Likewise, such lessees are held not to be within statutes relating to landlord and tenant. Hancock *v.* Diamond Plate Glass Co., 162 Ind. 146, 153, 70 N. E. 149, 152.

[13] Kokomo Natural Gas & Oil Co. *v.* Albright, 18 Ind. App. 151, 47 N. E. 682; Lawson *v.* Kirchner, 50 W. Va. 344, 40 S. E. 344.

[14] Kissick *v.* Bolton, 134 Iowa, 650, 112 N. W. 95; Headley *v.* Hoopgarner, *supra;* Campbell *v.* Lynch, 94 S. E. 739, 743 (W. Va.); THORNTON, OIL AND GAS, § 221.

[15] Chandler *v.* Pittsburgh, etc. Co., 20 Ind. App. 165, 50 N. E. 400.

[16] Indianapolis, etc. Gas Co. *v.* Pierce, 25 Ind. App. 116, 56 N. E. 137.

[17] "Rent is a certain yearly profit in money, provisions, etc., issuing out of lands and tenements, in retribution for the use, and it cannot issue out of a mere privilege or easement." 3 KENT, COMM. 460.

"Note, that a rent cannot be granted out of a piscary, a common, and advowson,

A royalty in an oil lease is a return for the right to take oil from the land.[18] It is submitted that a royalty is not a payment for the use of the whole tract of land, but a payment for the right to take oil from whatever part of the land on which the particular well happens to be located. The payment for the right to use the whole tract to drill on, in so far as there is a separate consideration for that right, is the so-called rent or preliminary payment described above.[19]

The importance of an exact definition of the nature of this return for the profit granted to the lessee in an oil lease is illustrated by cases where the land is, subsequent to the lease, divided into several tracts, which fall into the hands of different persons. A recent case in West Virginia, *Campbell* v. *Lynch*,[20] is of this sort. The lessor, after making a lease, died intestate, and the land descended to a number of co-heirs. Before the lessee drilled for oil on the land, the heirs brought a bill to partition the land, but did not mention the lease in the bill. The land was partitioned among them, with no reference to the lease, and after the partition the lessee drilled for and extracted oil from the land of some but not all of the heirs. Those on whose land no wells were sunk brought a bill praying that the royalties be divided among all the heirs. The court granted the decree on the ground that the royalties were rent and a payment for the right to use the entire tract of land, and hence belonged to the owners of the whole tract, no matter from what part of the land the oil was taken. That the result reached by the court is equitable, is clear, but the validity of the reasoning may be questioned, especially so far as such reasoning is applicable to other cases. If, for example, the owner of land subject to such a lease conveys part of the land to one person and part to another, with no mention of the lease, it would follow from the reasoning of the court that, since the royalty is a payment for the right to use the whole tract of land and not for the use of a particular part of the land, the royalties must be divided between these grantees in proportion to the amount of land held by each. It has been generally held, however, that each grantee is entitled to the royalties for the oil taken from his land, inasmuch as the royalty is a payment for the taking of the oil.[21] Again, if the owner of land subject to an oil lease divides it into several tracts and devises each tract to a different person, it would seem that the royalties should not be apportioned among the devisees as rent would be apportioned, but that they should go to the particular devisees from whose

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or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyne." Co. LITT. 144 *a*.

[18] Kissick *v.* Bolton, *supra*.

[19] Funk *v.* Haldeman, *supra*.

[20] Campbell *v.* Lynch, 94 S. E. 739.

[21] Northwestern Ohio Natural Gas Co. *v.* Ullery, 68 Ohio, 259, 67 N. E. 494; Fairbanks *v.* Warrum, 56 Ind. App. 337, 104 N. E. 983, 987, citing the Indiana cases on this point; Osborn *v.* Arkansas Territorial Oil & Gas Co., *supra*. In that case the court said: "Each purchaser from the lessor obtained and owned the gas in that part of the land bought by him, and was entitled to the rentals arising therefrom, and none other. The respective parties have no special equities in these rentals springing from the fact that the lease covered the entire tract . . . The gas obtained from each well was owned by the owner of the tract of land upon which it was sunk, and under the lease the rental therefore was disconnected with the remainder of the land covered by the lease."

land the oil was being taken.[22] It cannot be argued here that since each devisee is precluded from drilling for oil himself by the terms of the lease he should share in the royalties, for the consideration given to the testator in return for a right with reference to the whole tract was a right with reference only to certain parts of the land — those from which oil was being taken. For a person to benefit one part of his estate at the expense of another is no new thing in the law.

Although the reasoning in *Campbell* v. *Lynch* does not correspond to the true nature of these royalties, the result reached by the court is sound. The decree partitioning the land had no effect whatever on the royalties or the right to receive them. At the time of the partition neither the profit nor the right to royalties was in existence, but each was contingent on the discovery of oil as a condition precedent. There was nothing there to partition but the land. When the right to royalties did vest on the production of oil by the lessee, it was held by the heirs in common, and each was entitled to a partition thereof. It is submitted, however, that if oil were being produced at the time of the partition, the partition of the land with no mention of the royalties would have made the division of the latter among the heirs *res judicata*. It is such questions as these which make it important, in the simpler cases where the correct result is obvious, to define carefully the terms dealt with.

WHAT CONSTITUTES THE PRACTICE OF LAW. — Several courts in well-considered opinions have concluded that a corporation cannot engage in the practice of law.[1] The practically universal requirement of a license, granted only upon proof of satisfactory character and learning, makes it impossible for a corporation, as such, to become a member of the legal profession.[2] Nor will the courts permit a corporation indirectly to practise law through the medium of employees who are licensed attorneys.[3] A lawyer owes complete devotion to his client's interests. To allow him at the same time to serve another master — the corpora-

[22] But see, *contra*, Wettengel *v.* Gormley, 160 Pa. 559, 28 Atl. 934, reconsidered and affirmed in 184 Pa. 364, 39 Atl. 57. That case, however, can hardly be supported. In the first hearing of the case the court held that the devisees should share in the royalties in proportion to the land held by them, on the ground that the oil lease, because of the vagrant nature of the oil, was like a lease for general tillage, rather than like the right to take solid minerals from the land. In the reconsideration, the court held that the lease created a term for years in the lessee, that the royalty, being rent, was personalty and went intestate under the will which devised the land and did not mention the lease, and that it went to the children of the testator, who were the devisees, in proportion to the amount of land devised to each. If that is the law of the distribution of property after death in Pennsylvania, it is peculiar to that state.

[1] Matter of Coöperative Law Co., 198 N. Y. 479, 92 N. E. 15; Matter of City of New York, 144 App. Div. 107, 128 N. Y. Supp. 999. See also Commonwealth *v.* Alba Dentist Co., 13 Pa. Dist. R. 432; State Electro-Medical Institute *v.* State, 74 Neb. 40, 103 N. W. 1078.

[2] See Matter of Coöperative Law Co., 198 N. Y. 479, 483, 92 N. E. 15, 16.

Similarly, since a corporation cannot qualify as a practitioner, it cannot practise dentistry or medicine. Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597; Commonwealth *v.* Alba Dentist Co., 13 Pa. Dist. R. 432; State Electro-Medical Institute *v.* State, 74 Neb. 40, 103 N. W. 1078.

[3] "The relation of attorney and client is that of master and servant in a limited